

Stephanie Tatham

Subject: FW: Section 1500 comments
Attachments: 235 2011 06 27 Opposition to Motion to Dismiss.pdf

[\(Please note that the referenced attachment is posted separately on the Administrative Conference's project page.\)](#)

From: Dan Syrdal
Sent: Thursday, September 27, 2012 5:06 PM
To: Comments
Cc: 'Parris, Mark S.'; 'Keenan, David'; 'Nancy LeMay'
Subject: Section 1500 comments

To whom it may concern,

I am an attorney representing my clients RII and LRI in a case against the US Army Corps of Engineers, *RII v. US*, which is now in its 14th year in the Federal Court of Claims (No. 98-419C). After spending so many years of trying to get the case to trial in the face of incredible delay from another branch of the government, the Department of "Justice", it is truly refreshing to see that there is a branch of government that is trying to actually increase the fairness and efficiency in handling of plaintiffs' legitimate claims against the U. S. government.

This case is a perfect example to support either repeal or amendment of Sec. 1500 to avoid its operation under the circumstances where improper administrative action by the government has caused a taking under the U.S. Constitution. There is simply no argument whatsoever that application of Sec. 1500 prevents any redundant or duplicative litigation under these circumstances. An APA action trying to overturn a permit denial in the USDC is certainly in no way duplicative of a takings claim in the CFC seeking damages for a temporary taking based on all of the 10 years of delay our client incurred as a result of the Corps invalid and unreasonable assertion of jurisdiction (as so determined by the 9th Circuit Court of Appeals, *Resource Invs., Inc. v U.S. Army Corps of Eng'rs*, 151 F.3d 1162 (9th Cir. 1998) While some of the background facts may be the same as arising out of the same project circumstances, the "operative facts" are completely different since the issues are completely different. (DOJ, of course, takes an entirely different view of operative facts, basically defining them as the background facts.) No duplication of court or attorney time was involved as the legal issues were totally different and discovery was precluded in the APA action and extremely necessary in the takings action. And given that the APA action was a necessary prerequisite to even knowing whether ours was a temporary take (no jurisdiction and/or improper decision) or permanent take (if the Corps did have jurisdiction and made the appropriate decision), we necessarily had to file first in the USDC and didn't know the answer until our victory in the 9th Circuit. Furthermore, at the pertinent times, there was simply no Sec. 1500 issue to suggest the relative timing of filing the two actions was important since, before *Tohono*, the different operative facts and different requested relief were both a basis to avoid the operation of 1500. Obviously, the relief requested in a takings claim is different from the relief requested in an APA claim which is necessary to establish the taking. Thus even DOJ did not raise a Sec. 1500 defense in the takings claim before the Court of Claims until after the *Tohono* decision, when our case was already into its 13th year in that court. Thus, unlike the claims by DOJ, even the sophisticated, well informed lawyer would not have anticipated a problem in the typical APA/Takings case since both the operative facts and the different requested relief were grounds to avoid the application of Sec. 1500 before the *Tohono* decision. I am attaching our brief in opposition to DOJ's motion to dismiss our case and hope that it will be instructive on the type of case that I think is most egregiously challenged by DOJ under Sec. 1500.

I was very heartened by the fact that, despite the adverse position of the "Justice" Department (comprising three pages after a year's delay), the draft recommendation still includes what is, in essence, a repeal of Sec. 1500's severely unfair provisions. However, for the reasons set forth in the revised report by Ms. Bremer and Mr. Siegel, I would still prefer an outright repeal in recognition of the facts that the more complex your recommendation is the less likely is its rapid adoption and that the necessary mechanisms to avoid duplication already exist in the federal court system.

In addition, the repeal or amendment should make it clear that it applies to cases that are currently being faced with motions to dismiss under Sec. 1500, i.e. acts retroactively. Without this, existing takings cases (which had to be brought in the Court of Claims) arising from appeals of administrative actions (which had to be brought in District Court) would potentially (if DOJ wins its motions to dismiss in such cases) be dismissed simply because the later *Tohono* case “changed the law” with respect to Sec. 1500 applying to cases which clearly seek different relief in each court. (While we believe that the “operative facts” are different by definition in an permit appeal under the APA versus a takings case resulting from the administrative action, that is not the position DOJ is taking in these cases, a position clearly contrary to the intent of the recommended action.) Thus fairness demands that cases “caught” by the *Tohono* changes be given the same protection by the repeal. In fact, it is almost more important given the fact that the *Tohono* changes could not be anticipated as can the current state of the law.

The comments filed in this matter by the Department of Justice are, unfortunately, designed to further delay the fair resolution of the existing cases which are faced with their motions to dismiss based on Sec. 1500. While DOJ improperly argues that a repeal or modification of Sec. 1500 is inappropriate “when the impact of *Tohono* is not yet clear, and the basis for many if not all of the prior complaints about the statute may therefore cease to exist”, it ignores the fact that further delay just uses up more court time and continues the unfairness and unjustness of the positions DOJ is espousing in those very cases it says we should wait for. For example, in our case, DOJ is taking the position that our APA action seeking to show the Corps of Engineers had no permitting authority involved the same “operative facts” as our takings claim seeking damages for the 10 year delay in our client’s project caused by the Corps’ unreasonable assertion of jurisdiction. These are obviously entirely different operative facts, but not in the mind of the DOJ. They should not be rewarded for their continued attempts to delay ours, and others’, cases when their legal position is exactly what the ACUS is trying to avoid. This would just allow even further delay as we wait for a decision on their Sec. 1500 motion to dismiss, and the appeal which is likely to follow and add even more to the delay.

Rapid action by Congress is thus a critical aspect for my client’s case and many others that are mired in the Sec. 1500 motions in the Federal Court of Claims. We are now in our 14th year of trying to get a trial date, largely as a result of repeated delaying motions by the DOJ, the most recent of which is their 2011 motion to dismiss under *Tohono* which was brought about a year and a half ago. We still don’t have a decision on that motion, and once we do get it, I fully expect the DOJ to attempt interlocutory appeal of the decision to further delay the trial in this matter. Thus, a quick repeal of Sec. 1500 would likely save a great deal of time for my clients as well as for DOJ itself and for many others being faced with motions by DOJ to dismiss their cases under *Tohono*.

Respectfully Submitted,

Daniel Syrdal